Office-Supreme Court, U.S.
FILED
AUG 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 342

1. ROBERT N. BAEHR,
2. CHARLES BARON,
3. LEONARD BROWDE,
4. JOSEPH BURKE,
5. JACK DANIELS,
6. JOHN DORSEY,
7. MARSHAL FARR,
8. MILTON GLOGER,
9. FRANCIS GUARINI,
10. HAROLD HAGGERTY,
11. ELMER KOVACH,
12. ETTORE MOGLIA,
13. LEONARD NASH,
14. PHILIP PORRINE,
15. ROSE PORT,
16. JOSEPH RALL,
17. HENRY SCHMER,
18. LAWRENCE UNGARTEN,
19. LEO WEINSTEIN,

Petitioners

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CARL L. SHIPLEY
THOMAS A. ZIEBARTH
1366 National Press Building
Washington 4, D. C.

SAMUEL RESNICOFF
280 Broadway
New York, New York

Attorneys for Petitioners

SHIPLEY, AKERMAN & PICKETT
1366 National Press Building
Washington 4, D. C.
Of Counsel

August 15, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	4
Reasons for Granting the Writ	5
1. The United States Court of Claims Erred in Holding that Petitioners Failed to State a Claim Upon Which Relief Can Be Granted	5
2. This Case Presents an Important Question Affecting the Rights of Federal Employers to Seek Judical Review of the Propriety and Legality of Standards Published by the Civil Service Commission Pursuant to the Classification Act of 1949	10
Conclusion	10
Appendix A	1a
Appendix B	2a

CITATIONS

CASES:

Belsky v. *United States*, 290 F. 2d 593 (1961)	8n
Coleman v. *United States*, 100 C. Cls. 41 (1943)	8
Duquesne Warehouse Co. v. *R.R. Retirement Board*, 148 F. 2d 473	7
Dvorkin v. *United States*, 101 C. Cls. 296, cert. den. 323 U.S. 730 (1944)	8
Price v. *United States*, 112 C. Cls. 198 (1948)	8
United States v. *McLean*, 95 U.S. 750 (1877)	8

STATUTES: Page

5 U.S.C. § 1101 *et seq.*, The Classification Act of 1949 2, 3, 4, 5, 8, 9, 10, 11

28 U.S.C. § 1255 1

28 U.S.C. § 1491 ..... 2, 9

MISCELLANEOUS:

H.R. 11677 (Proposing a law entitled, the Equal Pay Act of 1962) 10

Report No. 1714, Committee on Education and Labor, 87th Cong., 2d Session, May 17, 1962 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

ROBERT N. BAEHR, ET AL., *Petitioners*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl L. Shipley, Thomas A. Ziebarth and Samuel Resnicoff on behalf of petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-captioned case on May 18, 1962.

OPINIONS BELOW

The order of the United States Court of Claims dated May 18, 1962, is unreported and is set out *infra* as appendix A. The decision of Classification Appeals Office of the United States Civil Service Commission of April 7, 1960, is set out *infra* as appendix B.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 USC § 1255.

QUESTION PRESENTED

Whether a suit by a group of federal civil service employees seeking a money judgment for the loss of salary they suffered by reason of the arbitrary failure and refusal by the Civil Service Commission to readjust the pay of their positions in accordance with the substantive and procedural requirements of the Classification Act of 1949, 5 U.S.C. § 1071 *et seq.*, constitutes a claim upon which relief can be granted by the United States Court of Claims.

STATUTES INVOLVED

Chapter 91 of the Judicial Code of The United States; 28 U.S.C. § 1491, *Claims against the United States generally,* provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *"

The Act of October 28, 1949 (The Classification Act of 1949), as amended, 63 Stat. 954, *et seq.*; 5 U.S.C., §§ 1071 to 1112, provides in pertinent part, as follows:

Chapter 21.—Classification of Civilian Positions

Subchapter I.—General Provisions

* * * * * *

§ 1071. Congressional declaration of policy.

It is the purpose of this chapter to provide a plan for classification of positions and for rates of basic compensation whereby—

(1) in determining the rate of basic compensation which an officer or employee shall receive,

(A) the principle of equal pay for substantially equal work shall be followed, and (B) variations in rates of basic compensation paid to different officers and employees shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of officers and employees to efficiency and economy in the service; and

(2) individual positions shall, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined in section 1091 of this title, and the various classes shall be so described in published standards, as provided for in section 1094 of this title, that the resulting position-classification system can be used in all phases of personnel administration.

* * * * * *

SUBCHAPTER IV.—FUNCTIONS OF CIVIL SERVICE COMMISSION

§ 1101. General authority of Commission.

(a) Notwithstanding section 1102 of this title, the Commission shall have authority, which may be exercised at any time in its discretion, to—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of any position;

(2) place in an appropriate class and grade any newly created position or any position coming initially under this chapter;

(3) decide whether any position is in its appropriate class and grade; and

(4) change any position from one class or grade to another class or grade whenever the facts warrant.

* * * * *

(b) Any employee or employees (including any officer or officers) affected or any department may request at any time that the Commission exercise the authority granted to it under subsection (a) of this section and the Commission shall act upon such request.

STATEMENT

Each of the petitioners is permanently employed as a Claims Examiner (Retirement), GS-993-9, at the New York Payment Center, Bureau of Old Age and Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare. In the court below they sought judgments for the differences in pay between the GS-9 level which they were actually receiving and the GS-11 level to which they claimed they were entitled. These positions are in the classified civil service of the United States and come within the purview of the Classification Act of 1949, as amended, 5 U.S.C. § 1071 *et seq.*

Petitioners initially sought to effect a reclassification of their positions administratively on June 27, 1956 when they filed an appeal with the United States Civil Service Commission. Further appeals were filed on August 30, 1957 and on October 21, 1959. In each instance these appeals were denied by the Civil Service Commission.

On June 30, 1960, petitioners filed their suit in the United States Court of Claims seeking a money judgment for the differences in pay between the GS-9 and GS-11 levels dating back to the initiation of the first administrative appeal in 1956.

Petitioners filed a motion for summary judgment on June 16, 1961, and the government filed a cross-motion for summary judgment. The court, in an order without opinion, granted government's motion and dismissed petitioners' case, Appendix A, *infra*, on the grounds that it "failed to state a claim upon which relief may be granted." It is that order to which this petition for a writ of certiorari is addressed.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Claims Erred in Holding That Petitioners Failed to State a Claim Upon Which Relief Can Be Granted

Petitioners' claim is for the difference in pay between the GS-9 and GS-11 levels. It is predicated upon the Classification Act of 1949, *supra*, the declared purpose of which is

> "to provide a plan for classification of positions and for rates of basic compensation whereby (1) in determining the rate of basic compensation which an officer or employee shall receive, (A) the principal of equal pay for substantially equal work shall be followed. * * *"

In a series of administrative appeals to the Civil Service Commission, petitioners sought, unsuccessfully, to have the pay of their positions as Claims Examiners (Retirement) GS 939-9, in the Bureau of Old Age and Survivors Insurance readjusted from GS-9 to GS-11. It was petitioners' contention that the positions which

they occupied and the work which they performed were substantially equal to those assigned to Veterans Benefits Authorizers, GS-11, in the Veterans Administration. A large body of evidence supporting this position was submitted by petitioners both at the administrative level and to the court below.[1]

The government never disputed petitioners' contention that the work of the two positions is substantially equal.[2] In fact, the only time any comparison was made between the two positions, there was a specific finding of fact that they *were* substantially equal.[3]

In the subsequent appeals to the Civil Service Commission this finding by the employing agency was never questioned. The decisions of the Second U. S. Civil Service Region and the Classifications Appeals Office of the Civil Service Commission (Appendix B, *infra*) made it clear that a comparison of the two positions was not and would not be made.

The Civil Service Commission looked only to its own published standard (GS-993 series) in deciding peti-

---

[1] Since petitioners' suit was dismissed for failure to state a claim upon which relief may be granted, the Court of Claims never reached this question.

[2] In its cross-motion for summary judgment in the court below the government merely contended that petitioners' claim raised issues of material fact.

[3] In the Departmental decision rejecting petitioners' reclassification request, dated February 3, 1958, the employing agency (HEW) stated:

> "It, therefore, appears that up to this point, except for the requirement of full professional legal training, that the position of Claims Examiner, GS-993-9-6615, has the characteristics of positions to which the Adjudicating Series, GS-960-0 is applicable. . . ."

tioners' appeal. It arbitrarily refused to re-examine the validity of its published standard despite the overwhelming evidence supplied by petitioners that they were performing work substantially equal to their GS-11 running mates in the Veterans Administration and that the published standard was founded on a specious premise with respect to the essential nature petitioners' work. The Civil Service Commission characterized petitioners' contention as roaming afield "in search of secondary or other questionable criteria when more valid sources are obtainable," (the "more valid sources" in this instance being the Commission's own published standards.) Appendix B, *infra*.

The attitude of the Commission was much like that of the Railroad Retirement Board in *Duquesne Warehouse Co.* v. *R. R. Retirement Board*, 148 F. 2d 473, 477, where Judge Hutcheson remarked,

> "But, says the Board in effect, the question is not what the courts think the act under construction here means, it is what the Board thinks it means, and the Board has spoken. Thus, by virtue of being constituted the Board to administer the Act, the Board has been endowed with a prescience, invested with a prepotence, in respect of statutory construction to which the courts must bow though the facts are undisputed and the question is entirely one of law. Thus by the simple expedient of having a lawyer, under the dignified name of General Counsel for the Board, issue an opinion and then adhering by a bare majority to that opinion, the Board is enabled to read the statute as it will."

Having thus exhausted their administrative remedies, petitioners filed their claim in the United States Court of Claims. That court dismissed the petition

(Appendix A) without an opinion. By reference to the government's motion for summary judgment it appears that the court below adopted the argument that the decision of the Civil Service Commission followed the procedures required by law and that petitioners were, in effect, seeking to "try title to an office they do not hold" (R. 120-124). In support of this position the government cited the decision of this Court in *United States* v. *McLean*, 95 U.S. 750 (1877) and the Court of Claims decision in *Coleman* v. *U. S.*, 100 C.Cls. 41 (1943), *Dvorkin* v. *U. S.*, 101 C.Cls. 296, certiorari denied, 323 U.S. 730 (1944), and *Price* v. *U. S.*, 112 C.Cls. 198 (1948).[4]

The government's reliance upon *U. S.* v. *McLean*, *supra*, is misplaced for the question there of whether claimant was entitled to extra compensation depended upon a *discretionary* act by his superior. In the instant case there is no discretion given to the Civil Service Commission. The Classification Act of 1949 clearly *requires* that agency to follow the principle of equal pay for substantially equal work. The *Coleman*, *Dvorkin* and *Price* cases, *supra*, are similarly inapplicable since they each involve a situation where the claimant was *appointed* to one position but did the work of a *different* and more highly compensable position.

---

[4] But see *Belsky* v. *U.S.*, 290 F. 2d 593 (1961), where the Court of Claims found that a doctor, inducted into the Army as a private, was entitled to the pay of a captain where the record showed that he was "doctoring as a doctor and not as a G.I." The court said.

> "And the fact that, in the Army, the plaintiff served exclusively in that capacity is not without significance. It adds a 'quantum meruit' flavor to his claim. It shows that the Government received the services for which plaintiff seeks compensation."

This is not the situation with petitioners herein. Under Section 1091 of the Classification Act of 1949, the term, "position," is defined as:

> ". . . The work, consisting of the duties and responsibilities, assignable to an officer or employee;"

Petitioners already hold the office *and* do the work of Claims Examiner (Retirement). They already perform a clearly defined body of "duties and responsibilities" assignable to that office or position. Their claim is that they are not receiving the salary which is properly assignable to the position which they already hold.

28, U.S.C. § 1491 confers general jurisdiction on the United States Court of Claims to render judgment upon any claim against the United States founded upon any Act of Congress or upon any regulation of an Executive Department.

Petitioners' claim against the United States is founded upon the violation by the Civil Service Commission of the Classification Act of 1949, 5 U.S.C. Section 1071 *et seq.* As a result of this violation petitioners have suffered a substantial and continuing loss of pay.

In these circumstances petitioners respectfully submit that they have stated an actionable claim against the United States in the court below and that the Court of Claims is bound to hear their claim.

2. This Case Presents an Important Question Affecting the Right of Federal Employees to Seek Judicial Review of the Propriety and Legality of Standards published by the Civil Service Commission Pursuant to the Classification Act of 1949.

This case is important far beyond the mere claim of petitioners for the extra compensation to which they believe they are entitled. As the government pointed out in its brief below (R-102n)

> "Although only 19 plaintiffs are named in this suit, there are 910 individuals occupying the same positions in the same grade who will be affected by the decision in this case."

Moreover, if the decision below is permitted to stand, no government employee in the classified Civil Service will be able to seek a judicial determination of his right to just and equitable compensation as defined and guaranteed by the Classification Act of 1949.[5]

If the words of Congress in setting forth the basic objective of the Classification Act (i.e. "equal pay for substantially equal work") have any meaning at all they must have been intended to create a substantive right in federal employees to have a rate of compensation assigned to their position which is consistent with this stated legislative intent.[6]

---

[5] This Court has never had occasion to construct this Act.

[6] Congressional concern with the principle of "equal pay for substantially equal work" is by no means confined to the Classification Act of 1949. In the current session, the House of Representatives has passed H.R. 11677 entitled, the Equal Pay Act of 1962, which would forbid discrimination in rates of pay for the same work as between men and women employees of *non-government* employers. See: Report No. 1714, Committee on Education and Labor, 87th Cong., 2d Session, May 17, 1962.

The Civil Service Commission is charged under the Act with the responsibility for placing positions in their appropriate class and grade. 5 U.S.C. § 1101(a). Under subparagraph (4) of this section the Commission may "change any position from one class or grade to another class or grade whenever the facts warrant." Any employee affected may at any time request the Commission to exercise this authority, and by the terms of 5 U.S.C. § 1101(b) "the Commission *shall* act upon such request." (emphasis supplied)

Classified federal employees plainly were given a procedural right by Congress to request the Civil Service Commission to exercise its authority in this regard and the Commission is bound to act upon such requests in a manner consistent with the law.

In the instant case petitioners contend that the standards published by the Commission for their position were inappropriate as to rate of compensation.

Application was made to the Commission pursuant to 5 U.S.C. 1101(b). The Commission held that since it had already published a standard for petitioners' position it would not reconsider the validity of that standard (as it was required to do under the law) but would merely measure the merits of petitioners' contentions in the light of the standard which it had already published. The Commission's final decision (Appendix B, *infra*) states it succinctly:

> ". . . To roam further afield in search of *secondary* or other *questionable* criteria when *more valid* sources are obtainable would not be in consonance with the law. This is one of the reasons we have applied *only* the GS-993 series in reaching a decision in this case." (italics supplied)

The Civil Service Commission takes the view that once it has published a standard for a position no classification appeal will be allowed except in the light of that standard. The court below, is dismissing the petitioners' claim, has signified its approval of this practice.

CONCLUSION

WHEREFORE, petitioners pray that this petition for a writ of certiorari to the United States Court of Claims be granted.

CARL L. SHIPLEY
THOMAS A. ZIEBARTH
1366 National Press Building
Washington 4, D. C.

SAMUEL RESNICOFF
280 Broadway
New York, New York

Attorneys for Petitioners

SHIPLEY, AKERMAN & PICKETT
1366 National Press Building
Washington 4, D. C.
Of Counsel

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 257-60

ROBERT N. BAEHR, ET AL.

v.

THE UNITED STATES

Order

This case comes before the court on plaintiffs' and defendant's motions for summary judgment. Upon consideration thereof, together with the opposition thereto, oral argument of counsel and the briefs of the parties, it is concluded that plaintiffs' petition fails to state a claim upon which relief may be granted, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted, plaintiffs' motion for summary judgment is denied, and plaintiff's petition is dismissed.

BY THE COURT,

/s/ MARVIN JONES
Marvin Jones,
Chief Judge

May 18, 1962.

APPENDIX B

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

IN REPLY PLEASE REFER TO
ICC:DSW:ibh

April 7, 1960

Mr. Samuel Resnicoff
Counselor at Law
280 Broadway
New York, New York

Dear Mr. Resnicoff:

We have completed our review of the classification appeals filed by you in behalf of Mr. Jack P. Daniels and 18 other Claims Authorizers employed by the Bureau of Old Age and Survivors Insurance, Social Security Administration. Included in our review were the arguments presented in your memorandum in support of the appeals.

After careful consideration and analysis of all of the facts, we found ourselves in substantial agreement with the Second Region's decision on all major points in the case. The appeals of your clients are therefore denied.

We concluded that the casework handled by the appellants was comparable to that visualized in the GS-993 standards at the GS-8 level. Evaluation of the casework to that grade, we believe, readily recognizes and gives full weight to the unusual degree of complexity inherent in the casework for which they are responsible. An additional grade was granted for "finality of action", i.e., the responsibility vested in and the full 100% review required of the appellants in authorizing payment of or disallowing a claim.

With respect to your argument that the duties and responsibilities of the appellants are substantially similar to those of the Veterans Benefits authorizer and that the

Adjudicating Series should be applied to the positions of your clients, the following explanation is deemed to be pertinent. When standards are available which are directly in point with duties and responsibilities in question, other sources of reference cannot be used in the resolution of classification appeals. Such is the case here. The GS-993 Retirement and Old-Age Insurance Claims Examining Series is applicable on all fours to the issues involved in these appeals. To roam further afield in search of secondary or other questionable criteria when more valid sources are obtainable would not be in consonance with the law. This is one of the reasons that we applied only the GS-993 series in reaching a decision in this case.

Your arguments with respect to the equal pay principle and to the validity and applicability of standards deserve some comment. The concept of writing and issuing standards so that they would be consistent on a cross-series basis was designed, among other things, to obtain the objective of "equal pay for equal work." Since the Commission was given, by statute, the responsibility for developing position standards, it has been constantly striving to improve its standards through revisions or issuances of new series. Through this continuous review method an attempt is made to assure equity as among positions in the Service and to provide a sound basis for the compensation of employees in a fair manner.

Prior to the establishment of the GS-993 series, a rather comprehensive study was made of the claims examining positions in the Social Security Administration. Inclusion of the positions in the GS-993 series was the result. The standard implementing that finding was published no longer than two years ago. That decision recognized the nature of the functions, the characteristics of the work and the qualifications required to perform duties assigned to positions concerned with claims adjudication in the Bureau of Old Age and Survivors Insurance.

Because of the recency and coverage of the GS-993 series, that criterion was considered by this office to be the most valid and reliable measure to apply to the positions of the appellants. Your request to use other standards, as a consequence, cannot be complied with. This determination is made in conformance with our responsibility under the law to apply the most pertinent standard available to positions under consideration.

We regret that a decision in your favor was not possible.

Sincerely yours,

/s/ ASA M. MCCAIN, *Chief*
Classification Appeals Office
Bureau of Inspections and
Classification Audits

cc: Chief, New York Payment Center
Bureau of Old Age and Survivors Insurance
New York, New York

cc: Director of Personnel
Health, Education & Welfare
Washington 25, D. C.

cc: Director, Second Region

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	6
Argument	9
Conclusion	11

CITATIONS

Cases:

Coleman v. *United States*, 100 C. Cls. 41	11
Cutting v. *Higley*, 235 F. 2d 515, certiorari denied, 352 U.S. 883	9
Dvorkin v. *United States*, 101 C. Cls. 296, certiorari denied, 323 U.S. 730	11
Eberlein v. *United States*, 257 U.S. 82	9
Keim v. *United States*, 177 U.S. 290	9
Powell v. *Brannan*, 196 F. 2d 871	9
Price v. *United States*, 112 C. Cls. 198	11
United States v. *McLean*, 95 U.S. 750	11
Wagner v. *Higley*, 235 F. 2d 518, certiorari denied, 352 U.S. 936	9

Statute:

Classification Act of 1949, as amended, 63 Stat. 954:

§ 101 (5 U.S.C. 1071)	2, 10
§ 302 (5 U.S.C. 1092)	3, 10
§ 401 (5 U.S.C. 1094)	3, 10
§ 501 (5 U.S.C. 1101)	4
§ 502 (5 U.S.C. 1102)	5, 10
§ 503 (5 U.S.C. 1103)	6

857898—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 342

ROBERT N. BAEHR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Claims (Pet. App. 1a) is not reported.

JURISDICTION

The order of the Court of Claims was entered on May 18, 1962 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly declined to determine whether a position in the federal civil service was properly classified when the Civil Service

Commission had reviewed the classification and found that the position was properly classified in accordance with standards published for that position.

STATUTE INVOLVED

The Classification Act of 1949, as amended, 63 Stat. 954, *et seq.*, 5 U.S.C. §§ 1071–1112, provides in pertinent part:

> § 101 [5 U.S.C. 1071]. *Congressional declaration of policy.*
>
> It is the purpose of this Act to provide a plan for classification of positions and for rates of basic compensation whereby—
>
> (1) in determining the rate of basic compensation which an officer or employee shall receive, (A) the principle of equal pay for substantially equal work shall be followed, and (B) variations in rates of basic compensation paid to different officers and employees shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of officers and employees to efficiency and economy in the service; and
>
> (2) individual positions shall, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined in section 301, and the various classes shall be so described in published standards, as provided for in title IV, that the resulting position-classification system can be used in all phases of personnel administration.

§ 302 [5 U.S.C. 1092]. *Basis for determination of position in class.*

(a) Each position shall be placed in its appropriate class. The basis for determining the class in which each position shall be placed shall be the duties and responsibilities of such position and the qualifications required by such duties and responsibilities.

(b) Each class shall be placed in its appropriate grade. The basis for determining the grade in which each class shall be placed shall be the level of difficulty, responsibility, and qualification requirements of the work of such class.

* * * * *

§ 401 [5 U.S.C. 1094]. *Preparation and publication of standards for classification of positions.*

(a) The Commision, after consultation with the departments, shall prepare standards for placing positions in their proper classes and grades. The Commission is authorized to make such inquiries or investigations of the duties, responsibilities, and qualification requirements of positions as it deems necessary for this purpose. In such standards the Commission shall (1) define the various classes of positions that exist in the service in terms of duties, responsibilities, and qualification requirements; (2) establish the official class titles; and (3) set forth the grades in which such classes have been placed by the Commission. At the request of the Commission, the departments shall furnish information for and cooperate in the preparation of such standards. Such stand-

ards shall be published in such form as the Commission may determine.

(b) The Commission shall keep such standards up to date. From time to time, after consultation with the departments to the extent deemed necessary by the Commission, it may revise, supplement, or abolish existing standards, or prepare new standards, so that, as nearly as may be practicable, positions existing at any given time within the service will be covered by current published standards.

(c) The official class titles so established shall be used for personnel, budget, and fiscal purposes, but this requirement shall not prevent the use of organizational or other titles for internal administration, public convenience, law enforcement, or similar purposes.

§ 501 [5 U.S.C. 1101]. *General authority of Commission.*

(a) Notwithstanding section 502, the Commission shall have authority, which may be exercised at any time in its discretion, to—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of any position;

(2) place in an appropriate class and grade any newly created position or any position coming initially under this chapter;

(3) decide whether any position is in its appropriate class and grade; and

(4) change any position from one class or grade to another class or grade whenever the facts warrant.

The Commission shall certify to the department concerned action taken by the Commission under paragraph (2) or (4) of this subsection. The department shall take action in accordance with such certificate and such certificate shall be binding on all administrative, certifying, pay roll, disbursing, and accounting officers of the Government.

(b) Any employee or employees (including any officer or officers) affected or any department may request at any time that the Commission exercise the authority granted to it under subsection (a) of this section and the Commission shall act upon such request.

§ 302 [5 U.S.C. 1102]. *Allocation of positions in appropriate grade by departments; review by Commission.*

(a) Except as otherwise provided in this title, each department shall place each position under its jurisdiction and to which this chapter applies in its appropriate class and grade in conformance with standards published by the Commission or, if no published standards directly apply, consistently with published standards. A department may, whenever the facts warrant, change any position which it has placed in a class or grade under this subsection from such class or grade to another class or grade. Such actions of the departments shall be the basis for the payment of compensation and for personnel transactions until changed by certificate of the Commission.

(b) The Commission shall, from time to time, review such number of positions in each department as will enable the Commission to

determine whether such department is placing positions in classes and grades in conformance with or consistently with published standards.

§ 503 [5 U.S.C. 1103]. *Reallocation of positions in appropriate grade by Commission.*

Whenever the Commission finds under section 502(b) that a position to which this chapter applies is not placed in its proper class and grade in conformance with published standards or that positions for which no standards have been published are not placed in classes and grades consistently with published standards, it shall, after consultation with appropriate officers or employees of the department concerned, place each such position in its appropriate class and grade and shall certify such action to the department. The department shall take action in accordance with such certificate, and such certificate shall be binding on all administrative, certifying, pay roll, disbursing, and accounting officers of the Government.

STATEMENT.

Petitioners are employed as Claims Examiners (Retirement) by the Department of Health, Education, and Welfare in the Bureau of Old-Age and Survivors Insurance of the Social Security Administration. The position of Claims Examiner had been classified by the Civil Service Commission at the GS–9 grade level. On the theory that they are entitled to "equal pay for substantially equal work" under the Classification Act of 1949, as amended, 63 Stat. 954, 5 U.S.C. 1071, *et seq.*, petitioners in June 1956 insti-

tuted administrative proceedings to have the position of Claims Examiner classified at the GS–11 grade level. The basis for petitioners' demand for reclassification is their claim that the work they perform is substantially equal to that performed by Veterans Benefits Authorizers, GS–11, in the Veterans Administration. Petitioners' request for reclassification was denied.

In August 1957, petitioners appealed to the Civil Service Commission for reclassification (R. 77). In March 1958, the Second Civil Service Regional Office determined that the position of Claims Examiner (Retirement) was properly classified; noting that there were no published standards covering that position and that the work in that position involves "a different kind and degree of judgment" than the positions with which petitioners wished to have it compared, the Regional Office compared the position with that of Adjudicator (Passports) and concluded that petitioners' position of Claims Examiners (Retirement) was properly classified at the same level (GS–9) (*ibid.*). Petitioners appealed this ruling to the Classification Appeals Office of the Civil Service Commission, which upheld the ruling in July 1958; pointing out that standards for Retirement and Old-Age Insurance Claims Examining positions had been published in April 1958, the decision on appeal concluded that "the appealed positions are fully covered [by the published standards] at the GS–9 level in consideration of such factors as complexity of cases, finality of action, application of technical criteria and judgment exercised" (*ibid.*).

In October 1959, petitioners filed another appeal with the Second Civil Service Regional Office (Pet. 4). The Regional Office denied the appeal on the basis of the April 1958 published standards for the position; it gave detailed consideration to the current duties and responsibilities of the position in relation to each of the four factors in the published standards (Nature of Participation in the Claims Examining Process, Finality of Action, Technical Criteria Applied, and Judgment Exercised) and found that petitioners' position was "equivalent in all four pertinent factors to positions shown in the standards as typical of the GS–9 level" (R. 79). On appeal, the Classification Appeals Office of the Commission again determined that the position of Claims Examiner (Retirement) was properly classified at the GS–9 grade level (Pet. App. B). In refusing to compare petitioners' position with the grade GS–11 position of Veterans Benefits Authorizer, Veterans Administration, the Commission concluded that the April 1958 published standards provided "the most valid and reliable measure to apply" in evaluating petitioners' position, noting that those standards resulted from "a rather comprehensive study * * * of the claims examining positions in the Social Security Administration," that they were published "no longer than two years ago," and that they precisely covered the duties and responsibilities of the position in question (*id.* at pp. 3a–4a).

Petitioners thereafter filed this action in the Court of Claims to recover the difference in pay between that of the GS–9 position which they now occupy

and the grade GS–11 to which they desire reclassification (Pet. 5). The court granted the government's motion for summary judgment and dismissed the petition (Pet. App. 1a).

ARGUMENT

The decision below is plainly correct. The Court of Claims properly declined to review the determination of the Civil Service Commission, made after a thorough analysis of the duties and responsibilities the petitioners perform, that the position of Claims Examiner (Retirement) should be classified at the GS–9 grade level.

1. It is well settled that the courts will not interfere with discretionary acts of executive agencies respecting personnel matters, except to insure substantial compliance with prescribed statutory or procedural requirements. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A.D.C.); *Cutting* v. *Higley*, 235 F. 2d 515 (C.A.D.C.), certiorari denied, 352 U.S. 883. In *Wagner* v. *Higley*, 235 F. 2d 518 (C.A.D.C.), certiorari denied, 352 U.S. 936, a case directly in point, the court of appeals, in sustaining an administrative ruling that two positions in the Veterans Administration were not in fact interchangeable, declared that its "review of questions of this kind is necessarily limited * * *" (235 F. 2d at 519).

It is clear that the Civil Service Commission has fully complied with the statutory requirements of the Classification Act of 1949. Under this Act, positions in the federal classified civil service are to be

placed in the appropriate class or grade (§ 302, 63 Stat. 957, 5 U.S.C. 1092) in order to effectuate the congressional policy of "equal pay for substantially equal work" (§ 101, 63 Stat. 954, 5 U.S.C. 1071). The basis for determining the grade in which each position shall be placed is "the level of difficulty, responsibility, and qualification requirements of the work of such class" (§ 302, 63 Stat. 957, 5 U.S.C. 1092). The Commission has sole responsibility for preparing standards for placing positions in their proper classes and grades (§ 401, 63 Stat. 957, 5 U.S.C. 1094), and the executive departments must place positions in their appropriate class and grade "in conformance with standards published by the Commission" (§ 502, 63 Stat. 958, 5 U.S.C. 1102).

It is clear that the Commission placed petitioners' positions in the Grade GS–9 level after a careful consideration of the "level of difficulty, responsibility, and qualification requirements of the work of such class" (5 U.S.C. 1092(b)), and in conformity with the published standards establishing the pertinent criteria for grading claims examining positions (see pp. 6–8, *supra*). The fact that the Commission refused to consider the similarities and differences between petitioner's duties and those of the Veterans Benefits Adjudicators is not relevant, since the statute imposes no obligation to classify a position by comparing it with every other position which might be in any way similar.

2. Furthermore, this action is without foundation because petitioners seek to recover the salary of a

position and grade to which they have not been appointed. It is settled that a government employee is entitled only to the salary of the position to which he is appointed, regardless of the duties he actually performs. *United States* v. *McLean*, 95 U.S. 750; *Price* v. *United States*, 112 C. Cls. 198; *Coleman* v. *United States*, 100 C. Cls. 41; *Dvorkin* v. *United States*, 101 C. Cls. 296, certiorari denied, 323 U.S. 730.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
EDWARD A. GROOBERT,
Attorneys.

SEPTEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 12 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 342

ROBERT N. BAEHR, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

In its brief in opposition to petitioners' application, respondent contends that the decision below is correct because "the courts will not interfere with discretionary acts of executive agencies respecting personnel matters" and because petitioners are allegedly seeking "to recover the salary of a position and grade to which they have not been appointed." These points are discussed seriatim.

1. This case presents a clear example of an abuse of discretion by an executive agency and an utter disregard of a prescribed statutory requirement. The Classification Act of 1949 *requires* the Civil Service Commission to follow the principle of "equal pay for

substantially equal work." The Commission is given no discretion in this regard. The *normal* means of achieving this Congressional mandate is through the machinery prescribed by the terms of the Classification Act itself including a procedural safeguard which allows any employee at any time to request the Commission to change the standard applicable to his position and, in the language of the statute, 5 USC, § 1101(b), "the Commission *shall* act upon such request." (Italics supplied)

Respondent's reliance on *Eberlein* v. *United States*, 257 U:S. 82; *Keim* v. *United States*, 177 U.S. 290; and *Powell* v. *Brannan*, 196 F. 2d 871 (C.A.D.C.) is misplaced since discretionary acts were involved in those cases, unlike here. Similarly, *Cutting* v. *Higley*, 235 F. 2d 515 (C.A.D.C.) and *Wagner* v. *Higley*, 235 F. 2d 518 (C.A.D.C.) are not in point, because "notably different positions" were involved. More importantly, in these latter cases, the agency examined and compared the two positions in question and made a finding that they were substantially different. In the instant case, it is the arbitrary failure and refusal of the Civil Service Commission to reexamine its own standard as called for in petitioners' application that was complained of in the court below. If the Commission had fairly considered petitioners' argument and evidence as to the substantial similarity between their positions and those of the Veterans Benefits Authorizers, GS-11, in the Veterans Administration, then *Cutting* and *Wagner*, *supra*, might have some application. However, *this is* precisely what the Commission refused to do. On the contrary, the earlier finding of substantial similarity made by the employing agency (Petition, page 6, footnote No. 3) was never questioned by the Commission.

In these circumstances, the Court of Claims has clearly abdicated its jurisdiction in refusing to hear the case.

2. Respondent's second contention is treated in the petition (pages 8-9). Petitioners seek only the salary properly assignable to *their* positions as required under the clear terms of the Classification Act, not some other position.

CONCLUSION

Clearly, petitioners state a claim upon which relief could have been granted by the United States Court of Claims. It is particularly important that the jurisdiction of the Court of Claims be redefined by this Court since it is the only tribunal competent to grant relief against the United States in a great variety of actions such as the instant case. Moreover, the only appeal from that court is to the Supreme Court of the United States.

Accordingly, petitioners respectfully urge that their petition for a writ of certiorari be granted.

CARL L. SHIPLEY
THOMAS A. ZIEBARTH
1366 National Press Building
Washington 4, D. C.

SAMUEL RESNICOFF
280 Broadway
New York, New York

Attorneys for Petitioners

SHIPLEY, AKERMAN & PICKETT
1366 National Press Building
Washington 4, D. C.
Of Counsel